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HTC CORPORATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DATAQUILL LIMITED,

Plaintiff,

v.

HTC CORPORATION,

Defendant.

HTC CORPORATION,

Counter-Claimant,

v.

DATAQUILL LIMITED,

Counter-Defendant.

Case No. 3:08-cv-00543-IEG-BGS

**MEMORANDUM IN SUPPORT OF
HTC'S MOTION TO EXCLUDE THE
OPINIONS AND TESTIMONY OF
JOSEPH GEMINI PURSUANT TO RULE
702 OF THE FEDERAL RULES OF
EVIDENCE [UNDER SEAL]**

Date: April 9, 2012

Time: 10:30 a.m.

Location: Courtroom 1

Judge: Hon. Irma E. Gonzalez

Magistrate Judge: Hon. Bernard G. Skomal

Complaint filed: March 24, 2008

Trial Date: July 10, 2012

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1 **I. INTRODUCTION¹**

2 On December 1, 2011, this Court granted HTC's motion to preclude certain testimony of
 3 DataQuill's damages expert, Mr. Joseph Gemini. It held that Mr. Gemini could not rely upon
 4 what he referred to as the "significant patent agreements"—agreements that HTC had entered into
 5 with giants of the telecommunications industry for patents essential to the practice of
 6 communications standards—in arriving at what he asserted to be an appropriate reasonable
 7 royalty for infringement of the patents-in-suit. Because this ruling eviscerated the core of Mr.
 8 Gemini's opinion, DataQuill sought permission to submit a new expert report. The Court granted
 9 that request, and on January 31, 2012, Mr. Gemini served his Superseding Expert Report on HTC.

10 No longer able to rely upon HTC's agreements with industry giants to provide a
 11 justification for his opinion, Mr. Gemini has now cherry-picked [REDACTED]
 12 [REDACTED] to provide a purported basis for his view of the outcome of a
 13 hypothetical negotiation. [REDACTED]

14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26
 27 ¹ References in brackets [] are to the consecutively paginated exhibits filed concurrently herewith.
 28 ² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Court has already held that agreements of this type do not provide a proper basis for calculating a reasonable royalty in this case.

This opinion is junk science at its worst. The Court should once again grant HTC's motion to exclude Mr. Gemini's testimony.

II. BACKGROUND

On July 16, 2011, DataQuill served the Expert Report of Joseph Gemini regarding its purported damages resulting from the alleged infringement of the asserted claims of U.S. Patent Nos. 6,058,304 ("the '304 patent"), 7,139,591 C1, and 6,058,304 C1 (collectively, "the patents-in-suit"). See Dkt. 135-2, Ex. 1 (Initial Gemini Rep.). Mr. Gemini used ten of HTC's licenses with industry giants (the so-called "significant patent agreements") to arrive at the extraordinary conclusion that HTC would have agreed to pay DataQuill [REDACTED]

³ See Declaration of William S. Hicks in Supp. of HTC's 3/12/12 Mot. to Exclude the Testimony of Joseph Gemini ("Hicks Decl."), Ex. 5 (transcript of 3/07/12 depo) at 490:6-14 [143].

On September 26, 2011, HTC moved to exclude Mr. Gemini's initial damages opinion, among other reasons, because Mr. Gemini had failed to establish that HTC's "significant patent agreements" were in any way comparable to the hypothetical agreement that would be reached between the parties to the present suit. *See* Dkt. No. 135. On December 1, 2011, the Court issued an order excluding Mr. Gemini's testimony to the extent he relied upon the "significant patent agreements" to determine a reasonable royalty. Dkt. No. 192. The Court recognized in its opinion that "comparisons of past patent licenses to the infringement must account for the technological and economic differences between them." *Id.* at 27 (quoting *Wordtech Sys. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1320 (Fed. Cir. 2010) (internal quotes omitted)). Because Mr. Gemini's initial expert report contained "no analysis at all of the economic differences between the 'significant patent agreements' and the license reached at the hypothetical negotiation," the Court concluded that his opinion "should be excluded on this ground alone." *Id.* at 29.

After receiving permission from the Court to try again, on January 31, 2012, Mr. Gemini served his Superseding Expert Report ("Superseding Report"), in which he purported to revise his initial damages opinion in light of the Court's December 1 Order. *See* Hicks, Decl., Ex. 1 (Superseding Rep.). Although he had previously denigrated DataQuill's prior licenses of the patents-in-suit as "settlements" that could not be used to evaluate the outcome of a hypothetical negotiation, in his Superseding Report, Mr. Gemini now contends that

⁴ At his most recent deposition, Mr. Gemini was still unwilling to opine that any of these agreements either prove or tend to prove an established royalty for the patents-in-suit—which is the *Georgia-Pacific* factor under which he considered them. *Id.*, Ex. 5 at 338:4-339:13 [105-106].

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10
 11 **III. ARGUMENT**

12 **A. Mr. Gemini continues to rely on prior licenses that are not comparable to the**
 13 **hypothetical agreement that would be reached between the parties.**

14 Although, in his Superseding Report, Mr. Gemini relies on a different set of agreements to
 15 concoct a new (but still unreasonable) set of royalty rates, he fails once again to carry his burden
 16 of proving that the agreements upon which he seeks to rely are economically comparable to what
 17 would have emerged from a hypothetical negotiation in this case. Indeed, even Mr. Gemini
 18 apparently does not believe that the [REDACTED] agreements are economically
 19 comparable, because he studiously avoids saying so in his report. *See, e.g.*, Superseding Rep. at
 20 30 [31] [REDACTED] agreements provide information “that could be deemed useful
 21 ...”); *id.* at 23 [24] [REDACTED] “provides an indication as to a calculable royalty rate ...”; *id.*
 22 at 26 [27] [REDACTED] “provide information that would allow the
 23 application of a royalty rate”); *see also* Hicks Decl., Ex. 5 at 339:8-10 [106] (“In terms of my
 24 analysis, they don’t prove an established royalty or generally tend to prove an established royalty.
 25 They do provide information ... as to royalty rates ...”). Because the economic circumstances
 26 surrounding the [REDACTED] are all “radically different” than the
 27 hypothetical agreement that would have been negotiated here, Mr. Gemini’s testimony must be
 28 excluded. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327-28 (Fed. Cir. 2009); *see also*

1 *ResQNet.com v. Lansa, Inc.*, 594 F.3d 860, 869-70 (Fed. Cir. 2010); *Wordtech Sys.*, 609 F.3d at
 2 1319-20.

3 1. The [REDACTED] Agreements.

4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED] These agreements are not
 11 in any way comparable to the license that would be negotiated as part of the hypothetical
 12 negotiation in this case.

13 Different scope of license. [REDACTED]

14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED] Thus, even if DataQuill may properly use the total value

23
 24 ⁵ See *Lucent Techs., Inc.*, 580 F.3d at 1330 (criticizing damages expert for relying on prior
 25 licenses without accounting for “whether the patented technology is essential to the licensed
 26 product being sold, or whether the patented invention is only a small component or feature of the
 27 licensed product”).
 28 [REDACTED]

1 of handsets sold by HTC as its royalty *base*, Mr. Gemini cannot calculate a reasonable royalty
 2 *rate* simply by applying the rates found in past agreements that have a different relationship to the
 3 patented technology.⁷ Because Mr. Gemini doesn't even attempt to adjust the royalty base (or
 4 rate) for the HTC products to account for the more limited functionality provided by the
 5 [REDACTED]—or even offer any way to show how such an
 6 adjustment could be made—his use of non-comparable royalty rates is arbitrary and unreliable.

7 **Sales volumes are incommensurate.** Mr. Gemini also fails to account for vast
 8 differences in sales volume. [REDACTED]

9 [REDACTED]
 10 [REDACTED] This huge disparity is significant
 11 because “[g]enerally speaking, the royalty rate and royalty base have an inverse relationship, so
 12 that when the base goes down the rate goes up, and vice-versa.” *See Gargoyles, Inc. v. United*
 13 *States*, 37 Fed.Cl. 95, 103 (1997). Mr. Gemini purports to account for this volume-discounting
 14 dynamic by suggesting that the lower sales volume “tends to lower the reasonable royalty to the
 15 lower end of the range.” But he fails to explain why it is sufficient merely to use the “lower end
 16 of the range” when the sales volume for HTC’s accused products is orders of magnitude greater
 17 than the sales volume in [REDACTED] That suggests that a whole
 18 different range would be appropriate. Notably, even after supposedly accounting for differences
 19 in sales volume, Mr. Gemini’s proffered minimum royalty rate of 0.6% [REDACTED]
 20 [REDACTED]
 21 [REDACTED]

22 **Amount of payment is radically different.** Mr. Gemini’s (unstated) assumption that the
 23

24 ⁷ *See Lucent Techs., Inc.*, 580 F.3d at 1339 (“There is nothing inherently wrong with using the
 25 market value of the entire product ... so long as the multiplier accounts for the proportion of the
 26 base represented by the infringing component or feature.”); *see also Laserdynamics, Inc. v.*
 27 *Quanta Computer, Inc.*, Case No. 2:06-CV-348-TJW-CE, 2011 U.S. Dist. LEXIS 42590, at *10
 28 (E.D. Tex. Jan. 7, 2011) (to establish comparability, “Plaintiff must present evidence sufficient to
 allow the jury to weigh the economic value of the patented feature against the economic value of
 the features and services covered by the license agreement”).

1 [REDACTED] are comparable to the hypothetical agreement at issue here is
2 also fundamentally at odds with the [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 [REDACTED]
10 In sharp contrast, DataQuill is presently seeking from HTC more than \$67 million in
11 alleged past damages (\$45.5 million for the '304 patent alone), not to mention a penny for each
12 and every dollar of total revenue it makes from selling mobile handsets into the future. Mr.
13 Gemini fails to account for these differences, or even acknowledge them, because [REDACTED]
14 [REDACTED] plainly do not support the
15 hyper-inflated running royalty figures stated in his report.

16 2. The HP Agreement.

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 ⁸ Companies that intend to exit the market, and indeed apparently never paid a cent in ongoing
25 royalty payments, would have far different incentives when negotiating a running royalty than
26 would HTC. Needless to say, a company that knows that it will never pay a running royalty on
27 future sales has little incentive to bargain for a low (or even reasonable) running royalty rate.
28 ⁹ [REDACTED]
[REDACTED]

1 [REDACTED]
2 [REDACTED] Superseding Rep. at 23 [24]. But Mr. Gemini's analysis
3 is so riddled with errors that it cannot pass muster under the *Daubert* standard. *See, e.g., Lucent*
4 *Techs., Inc.*, 580 F.3d at 1330-31; *Wordtech Sys.*, 609 F.3d at 1319-20.

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22
23 10 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

¹¹ See Hicks Decl., Ex. 5, at 427:19-25 [128]; *see also* Dkt. No. 135-2, Ex. 2 at 182:9-184:3.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] See *Wordtech Sys., Inc.*, 609 F.3d at 1319-20; *Lucent*, 580 F.3d at 1329-30.
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] Mr. Gemini ignores these agreements (and their negotiation history)—not because they
17 are irrelevant to the hypothetical agreement at issue here—but because they would cast severe
18 doubt on the inflated, result-driven damages opinions stated in his report. [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 12 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 It is a “sound principle of law, commonly accepted” that “the patentee’s usual licensing
2 approach should be considered in assessing a reasonable royalty.” *Studiengesellschaft Kohle,*
3 *m.b.H. v. Dart Indus., Inc.*, 862 F.2d 1564, 1568 (Fed. Cir. 1988). But despite this venerable and
4 common-sense maxim, Mr. Gemini’s so-called “methodology” is colored by a transparent desire
5 to inflate his royalty calculation by glossing over DataQuill’s real-world licensing practices.

6 Under Mr. Gemini’s approach, it doesn’t matter that [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 Nor is it instructive, according to Mr. Gemini, that [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 This sort of evidence
14 sheds a great deal of light on what DataQuill sought—and was actually willing to accept—in the
15 real world, which is a far better guide as to the likely course of a hypothetical negotiation than
16 Mr. Gemini’s speculation. “The law should make sense even in a field as murky as hypothetical
17 negotiations to fix a reasonable royalty.” *Studiengesellschaft Kohle, m.b.H.*, 862 F.2d at 1568;
18 *see also Riles v. Shell Exploration & Production Co.*, 298 F.3d 1302, 1313 (Fed. Cir. 2002)
19 (vacating damages award when expert’s damages “models ignored [plaintiff]’s established
20 licensing practice”). Under Mr. Gemini’s approach, it does not.

21 Because Mr. Gemini’s cherry-picking methodology is not explained by any valid principle
22 of economic analytical method, his unreliable royalty calculation must be excluded for this
23 additional reason. *See, e.g., Fail-Safe, L.L.C. v. A.O Smith Corp.*, 744 F. Supp. 2d 870, 891 (E.D.
24 Wis. 2010) (excluding purported expert analysis when no explanation was provided for reliance
25 on cherry-picked data).

26 **B. Mr. Gemini may not properly rely upon the [REDACTED]
27 [REDACTED] to bolster his reasonable royalty opinion.**

28 In an effort to blackboard a number that might support his overreaching running royalty

1 opinion, Mr. Gemini purports to find a [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] is unsustainable and hopes to prevent it from infecting the remainder of his report.
26 The Court should strike his opinion to the extent that he attempts to place reliance on this
27 agreement in order to put a percentage figure larger than his unreasonable running royalty in front
28

1 of the jury.

2 This is not the first time that Mr. Gemini has attempted to inject inappropriate material
3 into a jury's consideration by claiming that what he is advocating is simply a "reasonableness
4 check" on his main opinion. In *Uniloc*, the Federal Circuit held that Mr. Gemini had improperly
5 injected the total value of the products at issue while claiming that it was just a reasonableness
6 check. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1320 (Fed. Cir. 2011). *Uniloc*
7 argued on appeal that the total sales figure was brought in only as a check, and that the jury was
8 instructed not to base its decision on it. But the Federal Circuit rejected that "attempt[] to gloss
9 over the purpose of the check as lending legitimacy to the reasonableness of Gemini's \$565
10 million damages calculation." *Id.* at 1321. As the court explained, it was "of no moment" that
11 the entire market value was brought in only as a "check" because "even if the jury's damages
12 calculation was not based wholly on the ... check, the award was supported in part by the faulty
13 foundation ..." *Id.* So too here. As in *Uniloc*, Mr. Gemini's attempt to "skew the jury's damages
14 horizon" by presenting unreliable testimony concerning large (but entirely irrelevant) percentages
15 warrants the exclusion of his testimony. *Id.* at 1320.

16 **C. Mr. Gemini cannot properly use the [REDACTED] license to value the patents-**
17 **in-suit.**

18 Despite the Court's conclusion that Mr. Gemini cannot properly use licenses between
19 HTC and industry giants, covering broad portfolios of patents, to calculate a reasonable royalty in
20 this case, Mr. Gemini continues to insist on relying upon HTC's license agreement with [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 Mr. Gemini has made no attempt, however, to establish its comparability under binding

1 Federal Circuit precedent, or the Court's December 1 Order. To the contrary. In his Superseding
2 Report, Mr. Gemini expressly concedes that the second *Georgia-Pacific* factor is "inapplicable"
3 because he does not consider *any* of HTC's agreements, presumably including the [REDACTED]
4 [REDACTED] "to be comparable to the DataQuill and HTC hypothetical negotiation scenario."
5 Superseding Rep. at 31 [32]. Mr. Gemini also admitted in his deposition that he did not evaluate
6 his use of the [REDACTED] in light of the standards set forth in the Court's December 1
7 Order. Hicks Decl., Ex. 5 at 481:4-483:6 [141-42].

8 Even if the use of the [REDACTED] would be permitted under the Court's earlier
9 ruling concerning Mr. Gemini's attempted use of similar license agreements entered into for
10 broad patent portfolios (and it is not), Mr. Gemini's opinion is rendered unsound by his failure to
11 correctly perform a simple mathematical calculation. In his report, he notes that [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 In HTC's initial motion, HTC did not attack Mr. Gemini's use of the [REDACTED]
21 agreement as a justification for enhanced royalty rates, but instead argued more generally that Mr.
22 Gemini's enhanced royalty rates were invalid because they lacked a sufficient factual basis.
23 Thus, the Court did not sanction Mr. Gemini's reliance on the [REDACTED] agreement when it
24 denied that portion of HTC's motion. Because the [REDACTED] agreement is admittedly not
25 comparable to the hypothetical agreement under consideration, Mr. Gemini should not be
26 permitted to rely upon it to justify his proffered 0.1% enhancement.
27

1 **IV. CONCLUSION**

2 For the foregoing reasons, HTC respectfully requests the Court to exclude Mr. Gemini's
3 unreliable opinions and testimony from any trial in this case.

4
5 Dated: March 12, 2012

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6
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